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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1941

Number 1[illegible]6 US #3

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GEORGE BOHNKE and
MRS. HENRY T. (Eloise) BROWN
Petitioners

v.

THE PEOPLE OF THE STATE OF NEW YORK
Respondents

Petition for Writ of Certiorari to the County Court of Suffolk County State of New York

HAYDEN C. COVINGTON
Attorney for Petitioners

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v.

THE PEOPLE OF THE STATE OF NEW YORK
Respondents

■

Petition for Writ of Certiorari to the County Court of Suffolk County State of New York

To the SUPREME COURT OF THE UNITED STATES OF AMERICA:

Your petitioners, George Bohnke and Mrs. Henry T. (Eloise) Brown, present this petition for writ of certiorari to the County Court of Suffolk County, State of New York, to review a judgment on the remittitur and opinion of the New York Court of Appeals affirming judgments of conviction of your petitioners, and as grounds therefor say:

A

Summary Statement of Matters Involved

1. *Statement of Facts.*

The facts in this case are simple and undisputed, showing:

That petitioners George Bohnke and Mrs. Henry T. (Eloise) Brown were and are Jehovah's witnesses (R. 45), and as such each is an ordained minister of Jehovah God. (R. 57) Each was and is an accredited representative of the Watchtower Bible and Tract Society (R. 46), a New York corporation organized under the Membership Corporations Law, engaged in benevolent work for the moral and mental improvement of men and women by dissemination among them of Bible truths in various languages in printed form. Such distribution of literature is from house to house and is the method employed by petitioners and thousands of other of Jehovah's witnesses throughout the entire United States, as their major way of preaching the gospel of God's Kingdom. R. 48.

On June 30, 1940, petitioners and other of Jehovah's witnesses went from house to house quietly (R. 49), without disturbing the householder, without knocking at any door or ringing any doorbell, and silently placing at the door of each home a leaflet entitled "Dividing the People", containing information and opinion, which leaflet was introduced in evidence as an exhibit. (R. 49) It was free and no contributions were sought.

The leaflet shows how, in the spring of 1940, mob violence against Jehovah's witnesses flared suddenly throughout the entire land on a scale unprecedented, resulting in the destruction of property and untold injury to thousands of harmless and innocent men, women and children.

In further proof of their innocence in this mob violence, the leaflet quotes from the broadcast speech of the then

Solicitor General of the United States, Francis Biddle, given June 16, 1940, over the coast-to-coast network of the National Broadcasting Company, as follows:

> "Jehovah's witnesses have been repeatedly set upon and beaten. They had committed no crime; but the mob adjudged they had, and meted out mob punishment. The Attorney General has ordered an immediate investigation of these outrages. There is no cause for mass hysteria, nor justification for mob violence. The Department of Justice is well equipped to recognize the real danger spots and to deal with them vigorously."

R. 49; Exhibit 3.

The distribution of this leaflet in Southampton was for the obvious purpose of putting the truth on the subject before each person, showing Jehovah's witnesses are innocent in the matter and so as to remove prejudice against them resulting from misinformation as to the cause of that mob violence.

While the evidence shows that Bohnke and Brown did not have express prior consent of any householder before entering the premises, yet the evidence does show that they were invitees by implication and "licensees" going quietly from house to house in an orderly and proper way, under the circumstances. They were not trespassers. Such precaution against disturbing was occasioned by the distribution at daybreak.

This distribution of said leaflet thus done was part of a nation-wide distribution simultaneously carried out in the same manner under direction of the aforesaid Society, *in the interest of the public.*

The above facts were developed in the evidence before the Court of Special Sessions, Village of Southampton, at the trial of petitioners under informations charging a violation of a village ordinance. (R. 20-59) The informations were filed June 30, 1940. R. 14-16.

Petitioners were convicted (R. 59) and duly appealed to the County Court of Suffolk County. (R. 62-68) On March 4, 1941, the county judge rendered an order affirming the judgments of conviction (R. 75) and filed his decision and opinion overruling petitioners' contentions. R. 69.

Within the time and manner required by law the petitioners presented their application for leave to appeal to the Court of Appeals of the State of New York, pursuant to Article 520 of the Code of Criminal Procedure, to the Chief Judge, Irving Lehman. (R. 6-13) On June 2, 1941, said judge duly signed a certificate allowing appeal to the Court of Appeals. R. 3-4.

Thereafter the matter was brought on for regular hearing and argument in the New York Court of Appeals, and on December 4, 1941, that court rendered an order affirming the judgments of the County Court of Suffolk County, New York, and the Court of Special Sessions of the Village of Southampton, New York (R. 82), and on December 4, 1941, said Court of Appeals filed its per curiam opinion giving reasons for decision. R. 80. Appendix A, p. 12, *infra.*

2. *Statute here drawn in question.*

The legislation here drawn in question is an ordinance of the Village of Southampton, New York, to wit, Village Ordinance No. 28, which reads as follows:

"SOLICITORS, ETC., ON PRIVATE PROPERTY

"No person shall enter upon any private residential property in the Village of Southampton, Suffolk County, New York, for the purpose of vending, peddling, or soliciting orders for any merchandise, device, book, periodical or printed matter whatsoever; nor for the purpose of soliciting alms, or a subscription or a contribution to any church, charitable or public institution whatsoever; nor for the purpose of distributing any handbill, pamphlet, tract, notice or advertising matter, nor for the purpose of selling or distributing

any ticket or chance whatsoever, without the consent of the occupant of said premises previously given.

"Nothing herein contained shall be construed to apply to any person who has been a bona fide resident of the Village of Southampton, New York, for a period of at least six (6) consecutive months last past, nor to any person who has maintained a place of business in the Village of Southampton for a period of at least six (6) consecutive months, prior thereto, or his duly authorized representative. Any person violating this ordinance shall be subject to a penalty of not more than One Hundred ($100.00) Dollars for each violation thereof.

"Any violation of this ordinance shall constitute disorderly conduct, and the person violating the same shall be a disorderly person."

The ordinance appears in the record at pages 17, 69-70.

3. *Substantial Federal Questions Presented.*

By motion to dismiss filed in the Court of Special Sessions of the Village of Southampton, petitioners raised the federal questions here presented, asserting that the ordinance, both on its face and as construed and applied to petitioners, is unconstitutional and void in that it

a) unreasonably and unlawfully deprives petitioners of freedom to worship ALMIGHTY GOD Jehovah, and freedom of conscience, of speech, of press, and of assembly, all contrary to Section 1, Fourteenth Amendment to the Federal Constitution; and

b) unreasonably and arbitrarily makes unlawful that which is inherently lawful (by prohibiting entry upon property of another without obtaining express prior consent of the occupant), thereby depriving persons of liberties and privileges constitutionally safeguarded against State invasion, without due

process of law, and thereby constituting it legislation by individuals in that it vests each householder with the right to determine whether or not the ordinance shall be enforced, all of which is in excess of the police power of the village conferred by statutes of the State of New York; and

c) unjustly imposes discriminatory and improper classification predicated upon residence of six months in the village as a condition precedent to the exercise of rights guaranteed and secured by the Federal Constitution.

R. 43-45, 59.

The said Court of Special Sessions duly considered and passed upon such Federal questions and specifically held that the ordinance was applicable and that petitioners were not denied their rights under the Federal Constitution. R. 44, 45, 59.

In the petition for appeal presented to the County Court of Suffolk County each of the foregoing Federal questions was raised. (R. 62-68) The County Court of Suffolk County overruled specifically each of the foregoing constitutional questions. (R. 69) In the petition for leave to appeal to the Court of Appeals each of the foregoing Federal questions was urged. (R. 6-13) The New York Court of Appeals passed upon each of said Federal questions or assignments, attacking the validity of the ordinance, and that court held it valid and constitutional, both on its face and as applied, and found that the Fourteenth Amendment to the United States Constitution was not violated. See Opinion, R. ...

The Court of Appeals of the State of New York sustained the conviction of your petitioners and affirmed the judgment of the County Court of Suffolk County and of the trial court by overruling petitioners' aforesaid contentions.

Under the law of the State of New York, when the Court of Appeals renders its judgment and files its opinion in

connection with a case decided by it, the clerk of that court immediately issues a remittitur and returns the entire record on appeal, together with the judgment and opinion of the Court of Appeals, to the court below, which in this case is the County Court of Suffolk County, which procedure has been taken in this cause. (See Appendix A, p. 12, *infra.*) In this case said Court of Appeals does not possess the record and is not the court to which writ of certiorari should be directed, but the County Court of Suffolk County, New York, is the court possessed of the record; therefore the writ is properly directed to that court and to its judgment on the remittitur. R. 83.

B

Reasons Relied on for Allowance of Writ

The questions presented here are of national importance and basically affect the fundamental personal and civil rights of every person domiciled within the United States. The New York Court of Appeals has affirmed a judgment rendered by the County Court of Suffolk County, New York, on a most important Federal question in a way that nullifies the constitutional guarantees and provisions with respect to personal freedom.

The opinions of said courts below have misconstrued opinions of this Court and warped them so as to deprive them of their true meaning for the purpose of amputating petitioners' freedom.

The opinions and decisions of the courts below are in direct conflict with applicable decisions of this Court. The courts below have radically and so far departed from the accepted and usual course of judicial proceedings as to demand an order of this Court halting such extraordinary departure from established principles of liberty and constitutional law. In effect the said opinions and decisions have placed a "foreign amendment" upon the Constitution without "due process".

The undisputed evidence and findings of the courts below show that petitioners were not "trespassers" within the definition of that term, and that they were *licensees*, or implied *invitees*, because of the fact that they were calling at the people's homes, presenting to each householder *by leaving at the door* (without calling or otherwise disturbing the householder) a leaflet relating to a subject in which the distributors (petitioners) and the householders individually had a mutual interest.

There is no evidence that the petitioners were requested to leave the premises and refused to do so. The conviction was based upon the construction of the ordinance by the courts below, requiring express permission of the householder before entry on the premises for the purpose of distributing literature.

The ordinance in question is of the type generally known as the "Green River ordinance", which has been uniformly struck down and held unconstitutional on its face by the higher courts of many states.

Decisions by the courts below are in direct conflict with the opinions of United States District Courts declaring invalid and unconstitutional, as construed and applied to activity such as that of petitioners and other of Jehovah's witnesses, identical ordinances of this "Green River" type. See

Donley et al. v. City of Colorado Springs
40 F. Supp. 15
Zimmermann et al. v. Village of London (Ohio)
38 F. Supp. 582

The decisions of the courts below also are in direct conflict with the following cases:

City of Orangeburg (S. C.) v. Farmer (1936)
181 S. C. 143

Jewel Tea Co. v. Bel Air (1937)
172 Md. 536
Prior v. White (1938)
180 So. 347
White v. Town of Culpeper (1939)
172 Va. 630
City of McAlester v. Grand Union Tea Co. (1940)
98 P. 2d 924
De Berry v. City of La Grange (1940)
8 S. E. 2d 146
City of Columbia (S. C.) v. Alexander (1923)
119 S. E. 241
Real Silk Hosiery Mills v. City of Richmond, Calif. (1924)
298 F. 126
Ex parte Maynard
275 S. W. 1071
New Jersey Good Humor, Inc. v. Board of Comm'rs (1940)
11 A. 2d 113, 114
Jewel Tea Co. v. City of Geneva, Nebr. (1940)
291 N. W. 664
Hague v. C. I. O. (1939)
101 F. 2d 774
307 U. S. 496

In the above cases the courts found that the type of ordinance here involved was also unconstitutional and void *on its face* and even as applied to commercial canvassing and peddling from house to house of ordinary articles of commerce or business, other than literature containing information and opinion, on the principle that the police power did not warrant making unlawful a business which is inherently lawful; and therefore this type of ordinance was held unreasonable; and also on the principle that the implied license extended by law from the householder to any person calling at his home for a lawful purpose could

not be revoked by an ordinance of this type; and also by reason of the fact that this type of ordinance discriminated against non-resident in favor of resident business.

Another reason relied upon for allowance of the writ is the fact that each petitioner is an ordained minister of Almighty God, preaching the gospel of God's kingdom, and as such ministers they do not come within the provisions of the ordinance because they preach by publicly distributing literature from house to house concerning Biblical matters. It cannot be said by anyone, even this Court, that such does not constitute "preaching the gospel". Jesus Christ's apostles each and all taught and preached publicly and from house to house.—Matthew 7:10, 12-14; Acts 20:20.

Therefore, as construed and applied the ordinance deprives petitioners of their right of freedom to worship Almighty God and also freedom of press.

In this connection, this Court has held that the proper and most convenient place for distribution of pamphlets is the home of the individual inhabitant of this land. *Schneider* v. *State*, 308 U. S. 147. Therefore the ordinance as construed and applied is in direct conflict with *Lovell* v. *Griffin*, 303 U. S. 444; *Schneider* v. *State*, supra; *Cantwell* v. *Connecticut*, 310 U. S. 296.

The ordinance also imposes an improper classification, predicated upon residence, which is unreasonable and violates the "equal protection" clause of the Fourteenth Amendment to the Federal Constitution. The ordinance requires six months' residence in the village as a condition precedent to going from door to door for any lawful purpose. Under the ordinance, one must live in the village six months before exercising his prerogative right of freedom of press by distributing literature from house to house. The holding of the courts below in sustaining the validity of this provision is in conflict with *Truax* v. *Corrigan*, 257 U. S. 312, 331-333.

Wherefore your petitioners pray that this Court issue a writ of certiorari to the County Court of Suffolk County, New York, directing such court to certify to this Court for

review and determination on a day certain to be therein named, a full and complete transcript of the record and all proceedings in the case as numbered and entitled on the docket of said court; and that the decree of the court be reversed and that your petitioners may have such other and further relief in the premises as to this Court may seem just and proper under the circumstances.

GEORGE BOHNKE
MRS. HENRY T. (Eloise) BROWN
Petitioners

By HAYDEN C. COVINGTON
Attorney for Petitioners

Appendix A

ORDER ON REMITTITUR

[Endorsed filed Feb. 21, 1942, FRANK MARKVART, *Clerk*]

COUNTY COURT OF THE COUNTY OF SUFFOLK

PEOPLE OF THE STATE OF NEW YORK *against* GEORGE BOHNKE, *Appellant*	PEOPLE, etc., *against* MRS. HENRY T. (Eloise) BROWN, *Appellant.*

Appeals having been taken to the Court of Appeals in the above entitled proceedings, and pursuant to leave granted by Chief Judge IRVING LEHMAN of the New York Court of Appeals on the second day of June 1941, and notice of appeal duly served and filed by defendants-appellants on June 3, 1941; and said appellants having appealed from the whole and each and every part of said order of affirmance of the County Court of Suffolk County and from the whole and each and every part of the judgment of conviction rendered and entered by the Court of Special Sessions of the Village of Southampton;

And the Court of Appeals having duly heard said appeals, and after due deliberation thereon having ordered and adjudged that the said order of the County Court of Suffolk County be affirmed; and the remittitur of the Court of Appeals, together with certified copy of said order of affirmance by the Court of Appeals, having been filed in this Court;

Now, upon motion of Fred J. Munder, attorney for the respondent, PEOPLE OF THE STATE OF NEW YORK, it is

ORDERED that the said order of the Court of Appeals dated December 4, 1941 be and the same hereby is made the order of the County Court of Suffolk County.

L. BARRON HILL, *County Judge*

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

A

Opinions of the Courts Below

The opinion of the New York Court of Appeals is officially reported, 287 N. Y. 154, and is unofficially reported in 38 N. E. 2d 478. It appears in the record at pages 79 to 81.

The opinion of the County Court of Suffolk County is reported in 27 N. Y. S. 2d 241, and officially reported in 175 Misc. 989, and appears in the record at page 69.

B

Jurisdiction

1. *Timeliness.*

The jurisdiction of this Court is invoked under Section 237 (b) of the Judicial Code [28 U. S. C. A. 344 (b)].

The remittitur of the New York Court of Appeals was entered of record and issued on December 5, 1941. (R. 81-83) The County Court entered judgment on the remittitur February 21, 1942. R. 83-84.

The petition for writ of certiorari is filed herein before the expiration of three months from the date the decree and judgment of said New York Court of Appeals was rendered and entered, which is within the time allowed by law.

2. *The statute.*

The validity of state legislation under the United States Constitution was drawn into question in this case and the decisions of each of the courts below, to wit, the New York Court of Appeals and the County Court of Suffolk County, New York, were wrongfully in favor of its validity.

The legislation challenged here is an ordinance of the Village of Southampton which was in full force and effect at the time of the transaction in question. Said ordinance appears in full at pages 4, 5, supra. See R. 17, 69-70.

In holding that the ordinance is not unconstitutional because it abridges freedom of speech, press and worship in violation of the Fourteenth Amendment to the United States Constitution, the New York Court of Appeals held that the ordinance properly applied to the activity of petitioners and decided in favor of its validity on its face and as so applied. R. 79-81.

Petitioners duly and properly urged in all the courts below that the said ordinance on its face and especially as construed and applied to them was invalid because it deprived them of above described rights contrary to the "due process" and "equal protection" clauses of the Fourteenth Amendment to the United States Constitution.

From the very beginning, therefore, the validity of the legislation here challenged as being in contravention of the Fourteenth Amendment was thus drawn in question. The judgments of the trial court and the County Court of Suffolk County were in favor of the validity of such ordinance, and the New York Court of Appeals found in favor of the validity thereof, affirming the judgment of the County Court and of the trial court.

C

Statement of the Case

A full statement of the case has been given herein (supra, pages 2 to 7), and for the sake of brevity will not be repeated but is here referred to.

D

Specification of Errors

Petitioners assign the following errors in the record and proceedings of said case:

The Court of Appeals committed fundamental error in affirming the decision of the County Court affirming the judgment of the Court of Special Sessions by ruling that the petitioners were guilty of a violation of said ordinance of the Village of Southampton, because the said ordinance is invalid on its face and as construed and applied by the courts below, in that it deprives petitioners of their rights of freedom of press, of speech, of conscience, and of freedom to worship Almighty God as by Him commanded in the Bible, and is an unreasonable and arbitrary exercise of the police power of the State and Village contrary to the "due process" clause of the Fourteenth Amendment to the United States Constitution, and also violates the "equal protection" clause of the Fourteenth Amendment by discriminatory improper classification predicated upon six months' residence in the Village as a condition precedent to exercise of rights guaranteed and secured by the Fourteenth Amendment.

And for these reasons it is reversible error for the Court of Appeals to affirm the judgment of the County Court of Suffolk County affirming the judgment of conviction rendered by the Court of Special Sessions of the Village of Southampton, and to hold that the ordinance was valid and constitutional.

The courts below erred in holding that the ordinance as applied was a proper and valid exercise of the police power.

Points for Argument

FIRST

Ordinance No. 28 of the Village of Southampton is unconstitutional and void, both on its face and as construed and applied to petitioners, in that it unreasonably and unlawfully deprives them of freedom to worship ALMIGHTY GOD, Jehovah, and freedom of conscience, of speech, of press, and of assembly, all contrary to Section 1, Fourteenth Amendment to the Federal Constitution.

SECOND

Ordinance No. 28 of the Village of Southampton is unconstitutional and void on its face and repugnant to Section 1 of the Fourteenth Amendment to the Federal Constitution in that the part of the ordinance prohibiting entry upon property of another without obtaining express prior consent of the occupant is unreasonable, and arbitrarily makes unlawful that which is inherently lawful, and deprives persons of liberties and privileges constitutionally safeguarded against State invasion, without due process of law, and amounts to legislation by individuals in that it vests each householder with the right to determine whether or not the ordinance shall be enforced, all of which is in excess of the police power of the village conferred by statutes of the State of New York.

THIRD

Ordinance No. 28 of the Village of Southampton is unconstitutional and repugnant to the "equal protection" clause of the Fourteenth Amendment to the Federal Constitution, in that it is unjustly discriminatory and imposes an improper classification predicated upon residence of six months in the village as a condition precedent to the exercise of rights guaranteed and secured by the United States Constitution.

ARGUMENT

The first case following that of *Town of Green River* (Wyoming) v. *Fuller Brush Co.* (65 F. 2d 112; 1933) was *City of Orangeburg* (S. C.) v. *Farmer* (1936) (181 S. C. 143), which dealt with a like ordinance and also a Fuller Brush Co. salesman. The court refused to accept the reasoning of the *Green River* case and held the ordinance unconstitutional, saying—

> "The occupation of soliciting orders from house to house is a lawful one when conducted in a proper manner. The ordinance does not attempt to differentiate between salesmen who conduct themselves properly and those who do not. The ordinance . . . simply and boldly declares a lawful occupation a nuisance. . . . The ordinance is unreasonable, unconstitutional on this ground, and void."

The next case (*Jewel Tea Co.* v. *Bel Air,* 172 Md. 536; 1937) dealt with a combination Green River type of ordinance and exemptions granted to local merchants or farmers or "any one duly licensed". The court found the ordinances "void because they discriminate against the non-resident

in favor of the resident business and thus violate the Fourteenth Amendment to the Federal Constitution."

In *Prior* v. *White* (a Florida case), 180 So. 347, 1938, the person solicited by the Fuller Brush salesman admitted him to her house and eventually bought his merchandise. The court declared that, inasmuch as "invitation . . . may be implied from custom, usage or conduct, . . . as applied to this petitioner and the act or practice of soliciting orders for the sale of goods, wares and merchandise the ordinance is unreasonable and invades the petitioner's constitutional rights."

White v. *Town of Culpeper,* 172 Va. 630; 1939, like the Jewel Tea Company case was a combination of Green River ordinance against solicitation and the licensing of peddlers. The solicitor was a Real Silk salesman. The court said:

> "The ordinance under review is invalid for the reason that it permits peddlers and brokers, who are licensed . . . to do the very thing it prohibits a solicitor from doing. Likewise it accords to local merchants the privilege of soliciting orders from the citizens of the Town of Culpeper. This inconsistent treatment of citizens is admitted proof of the discriminatory character of the ordinance. . . . If the visitation of solicitors merely offends the household, it is, or may be, a private nuisance, but even so it is not punishable as a crime."

In *City of McAlester* v. *Grand Union Tea Co.,* 98 P. 2d 924 (1940), the court said: "The ordinance now considered is not regulatory but preventative and prohibitive as against an act innocent in itself and without surrounding facts or circumstances that would constitute the act a public nuisance."

In *De Berry* v. *City of La Grange,* 8 S. E. 2d 146, 1940, the Georgia Court of Appeals came to the same conclusion, saying,

> "While such solicitor may not be an invitee on the premises, we think usage and custom would constitute him at least a licensee rather than a trespasser where the householder has taken no steps to indicate that such a visit would be objectionable and would be considered as a trespass."

See also the host of cases outlawing this type of ordinance, cited at page ..., supra, this brief.

In other words, the courts have held that the legislature cannot make unlawful that which is inherently lawful and right when no justification therefor is shown. Free movement of the people *for right purposes* should not be hampered or destroyed, as this ordinance does. One's status of 'implied invitee or licensee' cannot be destroyed by legislative fiat without express consent of the persons involved, as is done in this case.

Petitioners are invitees because they were giving the people a message for the benefit of the residents upon a subject matter in which the householders and the appellants had a mutual interest. The subject matter shows insane, demonized persecution of decent, upright, harmless persons throughout the land, its true cause, the result, and a warning appeal to prevent like outrages in Southampton showing why such should be avoided. At the same time this was of general public knowledge and grave concern to all true Americans. Being for their benefit, it is presumed that all residents of good-will toward Almighty God gladly receive the information. There is no record that any of such complained.

In *Meiers* v. *Koch's Brewery*, 229 N. Y. 10, 12-14, the court held that when there was a mutuality of interest in the subject to which the visit relates, or if visitor's purpose is of interest or advantage to the owner, he is an invitee; otherwise he is a licensee. The court continued:

"To entitle one to rely upon an implied invitation to enter, his *purpose* must be of interest or advantage to the owner. . . . 'To come under an implied invitation as distinguished from a mere license, the visitor must come for a purpose connected with the business in which the occupant is engaged. . . . There must be *at least some mutuality of interest in the subject to which the visitor's business relates.*' (Plummer v. Dill, 156 Mass. 428)" [Italics added]

See also 33 *American Jurisprudence* 401, par. 94; and *Cudahy Packing Co.* v. *McBride* (CCA Neb.), 92 F. 2d 737. Even one who is a licensee cannot be guilty of criminal trespass. 63 *Corpus Juris,* par. 325, pp. 1086-1087, n. 25.

See also *Restatement of the Law of Torts,* Vol. 1, pp. 402-3.

Here the householder had not orally warned, or had not by writing notified, petitioners, prior to entry, not to enter the premises; or had not posted a sign stating, 'Jehovah's witnesses not wanted; do not enter.' In such eventuality petitioners would have been trespassers and subject to prosecution as such under the Penal Law of New York.

It is true, of course, that a man's home is his castle. This ancient rule of the common law has, however, been greatly modified in recent times. As Justice Holmes has said (*McKee* v. *Gratz,* 260 U. S. 127), "A license [to enter] may be implied from the habits of the country." "A license may be implied to enter the house of another, at usual and reasonable hours, and in a customary manner, for any of the common purposes of life." (37 C. J. 283) The path up to the door of a man's house, the absence of gate or other bar, the steps to the porch and the doorbell or knocker are all in themselves and in accordance with use and wont implied invitations to approach. The man who stands on the porch under such circumstances is not a trespasser under well-established law, but a licensee. (See *Stacy* v. *Shapiro,* 212 App. Div. 723; 209 N. Y. S. 305) *And in the case at bar, be*

it noted, petitioners were not even seeking entry to the house but were merely seeking to leave their leaflets outside the door.

The ordinance does not differentiate between house-to-house callers who conduct themselves properly and those who do not, and declares that the mere lawful act of soliciting or distributing literature from house to house is unlawful. The penalty is not based upon the *conduct* of the individual, but such *activity* is arbitrarily declared to be a nuisance. This character of activity, thus outlawed by the ordinance, is proper, necessary and lawful per se. It also penalizes as a trespass that which is in law and in fact not a trespass. "Trespass" is the going upon or remaining upon property after being notified in some legal way by the owner or his agent that the presence of an individual (or class of individuals) is unwanted or prohibited. A person who is upon the premises of another for a lawful and right purpose without such knowledge, is usually termed a "licensee" and does not become a "trespasser" until knowledge has been brought home to him.

One who is on the premises of another at the express or implied invitation of the owner is termed an "invitee".

The ordinance in question makes licensees and invitees *trespassers,* contrary to law, which unwarranted assumption of authority is in excess of the "police power". There is no reasonable connection between the motive prompting passage of the ordinance, the means employed, and the end to be attained thereby.

In attempting to justify the ordinance, the Judge of the County Court said that Southampton is an extraordinary village, from the standpoint of great wealth, beautiful residences, scenic grandeur, worldly prominence of residents, world fame, etc. As to this, there is no argument. They also must be specially protected, contended the County Judge, against invasion by persons of criminal tendencies. As to this, there can be little argument; but as to means employed, there is argument. However, we do insist that

those unique qualifications of that village do not isolate it or, in the eyes of the law, elevate it above communities inhabited by the less affluent or the poor, such as the greatest American municipality's Bowery section, or its Manhattan borough's former "East Side". Therefore any unique characteristics of the Village of Southampton in no way affect or determine validity of the ordinance. Even in Southampton constitutional rights of free press, free speech and freedom to worship can rightly be exercised by any person whether a visitor or a resident of the village for six months or more or less. The requirement of six months' residence as a condition precedent to exercise of these fundamental personal and civil rights is capricious and arbitrary discrimination and *abridgment of the rights,* and such legislative provision is repugnant to the "due process" and "equal protection" clauses of the Fourteenth Amendment, United States Constitution.

The extensive argument made in the court below for respondents, and also by the county judge, stressing certain unique qualifications and peculiarities of the Village and its motives for enacting the ordinance, does not warrant the unconstitutional application of the ordinance to appellants.

All these arguments were made for the State and the Town of Irvington in *Schneider* v. *New Jersey,* 308 U. S 147, where it was contended that the ordinance was needed "in the face of the all too frequent burglaries in the metropolitan section", and "to prohibit canvassing from house to house in the hours of the early morning or after nightfall". See Respondent's brief in that case and also 121 N. J. L. 542; 120 N. J. L. 460.

All such argument was brushed aside by Mr. Justice Roberts, who held the same to be insufficient to justify such attempted regulation, saying,

> " . . . the answer is that considerations of this sort do not empower a municipality to abridge freedom of

> speech and press. . . . We do hold, however, that the ordinance in question, *as applied to the petitioner's conduct,* is void, and she cannot be punished for acting without a permit." [Italics added]

The ordinance here in question deprives householders of their inherent personal right to recognize and receive upon their premises any unannounced or uninvited legitimate house-to-house caller. Let us see how the ordinance would actually work. The individuals have a vital message to deliver to the village residents. An invitation must first be secured to call at the residences. Are we to expect the distributor of literature to make a telephone list of all the residents of each street and then telephone each individual resident in an attempt to secure an invitation? Are we to expect the distributor of literature to go along the street shouting, "I have the Gospel, may I come to your door?"

Under the "Green River" type of ordinance a person is prohibited from selling his book except at homes which have given him a prior invitation to call for that purpose. In a town of one thousand homes he would thus have to secure one thousand permits or licenses to circulate his book throughout that community. This is greater denial of freedom of the press than that of the ordinance held invalid in *Lovell* v. *City of Griffin,* 303 U. S. 444. It can be clearly seen that the application of the "Green River" type of ordinance to the work of circulating printed matter denies liberty and would be held invalid by every court that follows this Court's clear declarations and definitions with respect thereto.

In respect to the holding of the court below, that by consent is meant express consent which must be each time separately obtained, thereby an impossible burden is imposed upon the disseminator of ideas. Telephonic requests if attempted to be made would be very burdensome both in time and in money and would doubtless be refused. If indulged in persistently, as the ordinance appears to invite,

they would soon become a pest which another ordinance might some day conceivably seek to regulate. In any event it is completely impracticable and as effectively deprives the pamphleteer or like disseminator of ideas of all right to distribute as though the ordinance contained a downright prohibition.

Suppose that one had literature warning of an invasion by Hitler or warning against 'fifth column' activity, or of the need for selecting competent and fair public officials, and notice to the people were imperative, would the public health, morals and safety be promoted at such a time or any other time by the enforcement of such an ordinance?

Or, suppose one passing through the Village, or who had not resided within its limits the prescribed "six months", saw a chimney afire, should he rightly be prevented by such an arbitrary enactment? NO. The "Green River" type of ordinance does not work in a democracy! Its inherent and basic quality smacks fiercely of that alien and detestable type of legislation best described by the words "authoritarian" and "totalitarian". The people of America have ordained freedom of the press, freedom of communication and inter-communication among themselves. They want nothing that smacks of the totalitarian.

The ordinance amounts to legislation by individuals rather than by the constituted authority because the ordinance can or cannot have effect according to the pleasure of individual occupants of premises, and makes unlawful that which is inherently lawful, in excess of the police power.

By the ordinance the governing body of the Village of Southampton has *unlawfully delegated* to the individual residents of the village the right to determine when and under what circumstances the act of going from door to door shall or shall not constitute violation of the law. This vice of unconstitutional delegation of authority was outlawed in *Ex parte Maynard,* 275 S. W. 1071.

The ordinance imposes an improper classification predicated upon residence, and in operation is unreasonable

because of lack of rational connection between the interdiction of the ordinance and the end ostensibly sought to be accomplished and therefore violates the "equal protection" clause of the Fourteenth Amendment to the United States Constitution.

The requirement of six months' residence in the village as a condition precedent to going from door to door for any lawful purpose is clearly a denial of equal protection of the laws and arbitrary discrimination contrary to the "due process" and "equal protection" clauses of the Fourteenth Amendment. It is to be noted that the prohibited visits are not confined to unlawful visits but also include *lawful* ones. One cannot lawfully be required to reside in a city any length of time as a condition precedent to exercising his right of freedom of speech, press and worship. Such rights can be exercised without residence. The very purpose of the Constitution is to equalize the rights of every individual and make the same enjoyable equally in every state and subdivision thereof, and these rights cannot be taken away by arbitrary fixing of any particular length of time as a condition precedent.

In this connection we are reminded of the opinion of the judge of the county court below in which he expressly says that Jehovah's witnesses are obviously not the type or character of persons who would engage in the criminal activities aimed at by the ordinance in question. Concerning them, he said: "There isn't any question in anyone's mind about the honesty of purpose of the defendants or their freedom from any nefarious scheme. What they were doing was undoubtedly harmless. Maybe it did a lot of people good . . . " R. 73.

Before this Court outlawed an identical "Green River" type ordinance of the City of Jersey City in *Hague* v. *C. I. O.*, supra, a like argument was advanced in a letter sent by that city's corporation counsel to Jehovah's witnesses to dissuade them from subjecting themselves to continuous ar-

rests for violation of the ordinance. The corporation counsel wrote:

> "We appreciate the fact that your work is entirely charitable and benevolent and that it is done, as you state, solely because of your love for God and His Kingdom, and not for pecuniary profit. . . . There can be no discrimination in the enforcement of this ordinance. It has been enforced against everyone as a measure of protection to our citizens, and the validity of the ordinance has been upheld by the Supreme Court of this State. . . . There are of course *many other ways of disseminating your information* which is entirely legal such as the radio, newspapers and the United States Mail." [Italics added]

The very purpose of the "equal protection" clause is to insure equality of freedom of locomotion, travel and commerce for all inhabitants of the states and subdivisions thereof.

This provision of the ordinance amounts to class legislation and discrimination against some and the favoring of others. As an illustration, even all *peddlers* under the ordinance are not treated alike. Resident peddlers are favored over non-resident peddlers. Additionally, the ordinance does not treat equally all persons who, though not peddlers, are desirous of exercising their right of *press activity* within boundaries of the village, i. e., their right to disseminate ideas in printed form.

This Court, in *Truax* v. *Corrigan* (257 U. S. 312, 331-333), said:

> "But the framers and adopters of this amendment were not content to depend on a mere minimum secured by the due process clause, or upon the spirit of equality which might not be insisted on by local public

opinion. They therefore embodied that spirit in a specific guaranty. The guaranty was aimed at undue favor and individual or class privilege, on the one hand, and at hostile discrimination or the oppression of inequality, on the other. It sought an equality of treatment of all persons, even though all enjoyed the protection of due process."

The police power, however broad and extensive, is not above the Constitution in obedience to the commands of which the courts will protect the rights of individuals from invasion under the guise of police regulations when it is manifest that such is not the object and purpose of the regulation. Thus the appellees can seek no comfort from the recitations in the preamble to Village Ordinance No. 28 of Southampton. Note that the ordinance does not have for its real purpose the prevention of trespasses. The act of trespass in its quality is not prohibited. On the face of the ordinance, only Jehovah's witnesses living in Southampton may "lawfully" do exactly the same act that, if done by one of Jehovah's witnesses residing in any other community of Suffolk County, would constitute a crime.

The ideas disseminated by those who have been exposed to the Southampton climate for a certain period of time are no more likely to be worth distributing than those of persons less favored. The exception, however it may be looked at, is not only arbitrary, but nonsensical, capricious.

Thus it is obvious that the ordinance does not permit even an extraordinary municipal community of the socially elite to erect a "Chinese wall" excluding a non-resident (or a resident not having 'anchored' in the village for six months or more) from exercising his fundamental civil rights within its boundary.

Obviously, also, if this law be sustained, even the man in the watchtower at Montauk Point, scanning the horizon that he might report indications of danger of threatened invasion by Stukas or Nazi parachutists, could not on dis-

covery, and after fleeing to Southampton, warn its residents, from house to house, of the danger, that they might take timely steps to protect themselves against the real peril, until he himself had resided in the village for half a year after arriving with the alarming news!

Furthermore, we strenuously urge that this ordinance is void *on its face*, because, by its terms, it prohibits the distribution, from house to house, of literature of any kind, whether by gift or sale, which type of attempted regulation was outlawed in the three companion cases joined with *Schneider* v. *State*, supra, which said ordinances were held to be void on their face.

The ordinance on its face and as construed and applied prohibits *circulation* and *distribution*, which are essentially vital to, if not the very life of, freedom of the press; and because thereof it violates the Fourteenth Amendment.

Schneider v. State
supra
Cantwell v. Connecticut
supra
Lovell v. City of Griffin
supra
Carlson v. California
310 U. S. 106
Thornhill v. Alabama
310 U. S. 88

A municipality cannot restrict or prohibit press activity from house to house, as it also cannot restrict such activity on the streets. Mr. Justice Roberts said:

> " . . . And perhaps the most effective way of bringing them [pamphlets] to the notice of individuals is their distribution *at the homes of the people*." [Italics added]

Schneider v. State
supra

The Court of Appeals of the State of New York relies upon the case of *Town of Green River* v. *Fuller Brush Co.*, supra, which is the case that lent its name to this type of ordinance. That case dealt only with door-to-door vendors of merchandise, and the ruling in the case, therefore, that the ordinance was properly invoked as against a vendor of merchandise is not a precedent in this case. But since that identical type of ordinance has been held unconstitutional in almost all subsequent cases, whether applied to door-to-door vendors of merchandise or to free pamphlet distribution, it is worth while to analyze the cases carefully. They divide themselves into those which deal with vendors of merchandise and those which deal with pamphlet distribution, whether advertising or non-commercial.

In the *Town of Green River* case, supra, the ordinance was sustained as valid when applied to the ordinary form of peddling of articles of merchandise, commercially, from house to house. However, that case does not govern here and is distinguishable.

Here the CONTROLLING POINT to be kept in mind at all times is that even a constitutional ordinance or statute may be valid when given one *application* and invalid when given another.

Concordia Fire Ins. Co. v. Illinois
292 U. S. 535, 545

In *Schneider* v. *State*, supra, it was held that valid ordinances regulating commercial peddling of merchandise may be proper for the regulation of distribution or sale of ordinary *merchandise* but would not warrant regulation of dissemination of printed information or argument. The court said:

" . . . Mere legislative preferences or beliefs respecting matters of public convenience may well sup-

port regulation directed at *other personal activities*, but be insufficient to justify such as diminishes the exercise of rights so vital to the maintenance of democratic institutions." [Italics added]

The "Green River" type of ordinance has been held inapplicable to the work of Jehovah's witnesses in many cases, several of which are by the lower federal courts. Those courts make clear distinction between the *Fuller Brush* case and the cases involving the wholly unrelated activity of Jehovah's witnesses.

On August 9, 1941, in the Tenth Federal Judicial Circuit where the "Green River" ordinance case originated and was first sustained, the United States District Court declared an ordinance of that type invalid as applied to Jehovah's witnesses, and enjoined its enforcement, saying,

> " . . . 65 Fed. (2d) 112 (CCA 10th), relied upon by defendants, is not in point, for the appellant in that case was engaged in *purely commercial transactions*, to wit, taking orders for goods, and the questions here discussed were not mentioned. The cases already cited show plaintiffs did not come within the definition of the Colorado Springs ordinance. . . .
>
> "We therefore conclude the plaintiffs are entitled to relief on two grounds. First, that the plaintiff, a *minister of the Gospel* [even as Bohnke and Brown in the case here presented for review], *is not within the definition of the ordinance*. And, secondly, *that as applied to him and his calling* and the *acts complained of*, its enforcement deprives him of rights and privileges secured by the Constitution of the United States." [Italics added]
>
> Donley et al. v. City of Colorado Springs
> 40 F. Supp. 15

That very recent *Colorado Springs* case, specifically distinguished by the district court from *Town of Green River v. Fuller Brush Co.* (65 F. 2d 112), follows expressly *Zimmermann et al.* v. *Village of London* (Ohio) (April 25, 1941), 38 F. Supp. 582, restraining enforcement as to Jehovah's witnesses of another "Green River" ordinance. There United States District Judge Underwood held:

> "In the case now before this Court, the ordinance . . . imposes what amounts to a virtual prohibition upon such distribution, and this is stated understandingly, in view of the charges filed by the authorities against these plaintiffs. Certainly there is no prospect under the ordinance for the 'free and unhampered distribution of pamphlets' as envisaged by the Supreme Court. It may be added that freedom of the press contemplates not only the right to print, but also, the right to distribute.
>
> " . . . Although the theory of the ordinance is purportedly trespass, the theory can give no sanction to the denial of fundamental rights under the Constitution. . . .
>
> " . . . The question has been tried only upon the application of the ordinance to these plaintiffs and to those similarly situated engaged in house-to-house distribution of printed matter and of oral and written opinion. As so applied, the Court finds said ordinance *unconstitutional* to the extent that it interferes with such constitutional rights of the plaintiffs and those similarly situated and engaged, and a permanent injunction will issue to restrain the defendants from so enforcing said ordinance."

It is clear, therefore, that the Court of Appeals of the State of New York stumbled into the 'pit of error' while

attempting to 'perform the delicate and difficult task of appraising the substantiality of the reasons advanced' in support of the ordinance in question. That court did not give proper weight to the reasons advanced by petitioners in support of the questions presented.

Conclusion

It is therefore submitted that this case is one calling for exercise by this Court of its supervisory powers, to the end that errors complained of may be corrected, and to such end a writ of certiorari ought to be granted and directed to the County Court of Suffolk County, the court to which the Court of Appeals remitted the record and its opinion, and which Suffolk County Court now possesses the record in this case, so that this Court can review the decisions and judgments of the Court of Appeals of the State of New York, the County Court of Suffolk County, New York, and the Court of Special Sessions of the Village of Southampton, New York.

Confidently submitted,

HAYDEN C. COVINGTON
Attorney for Petitioners

BRIEF FOR THE RESPONDENTS IN OPPOSITION

SUPREME COURT

OCTOBER TERM, 1941

No. 1005

GEORGE BOSKER and MRS. HELEN T. (ELLIS) BOSKER,

Petitioners,

vs.

THE PEOPLE OF THE STATE OF NEW YORK,

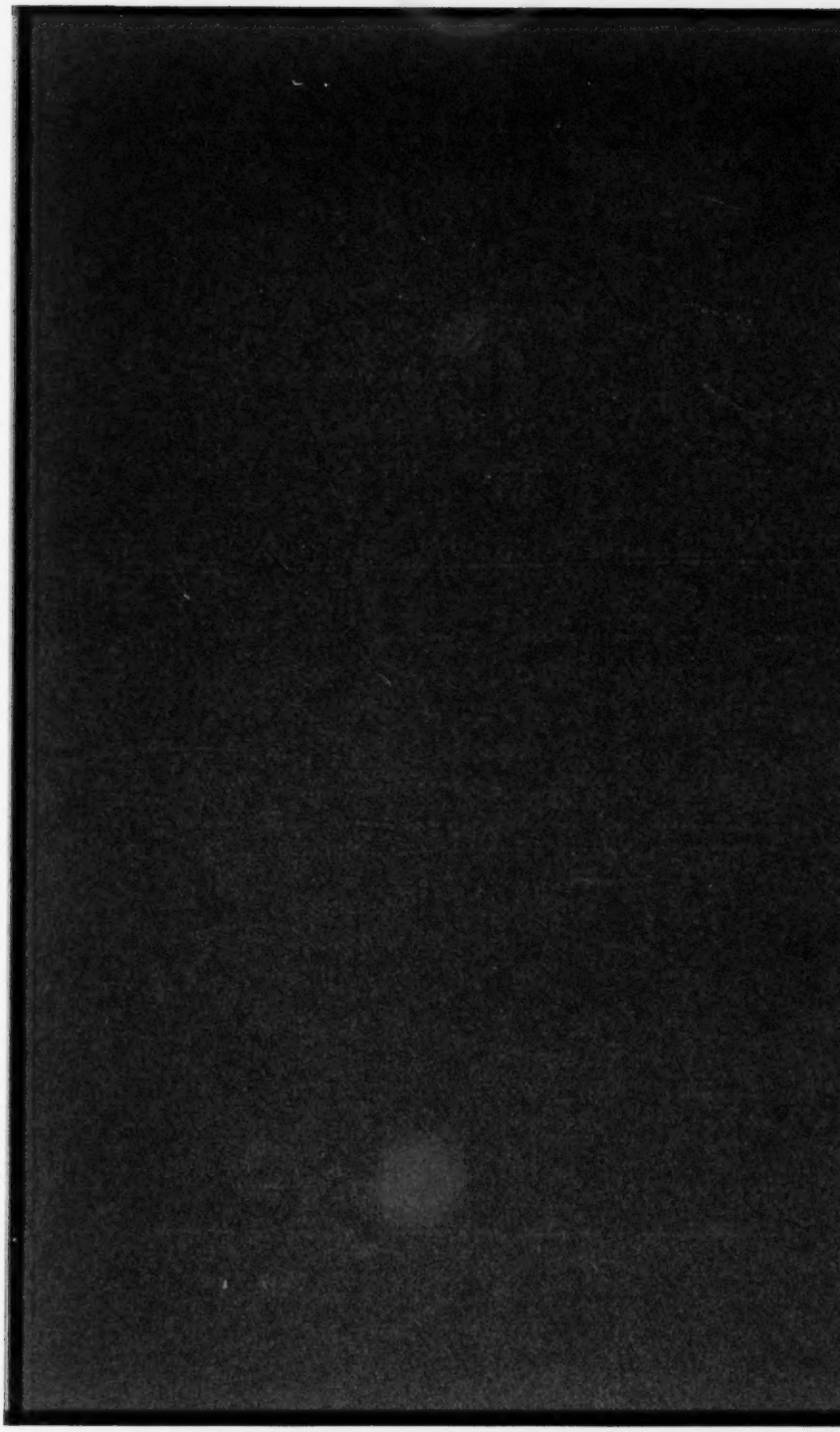
Respondent.

RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE COUNTY COURT OF SUFFOLK COUNTY, STATE OF NEW YORK

JOHN J. BENNETT,
Attorney General of the State of New York,
Attorney for Respondents.

FRED J. MUNDER,
District Attorney of Suffolk County,

HENRY TASKER,
Assistant District Attorney,
of Counsel.



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BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

A

Opinions Delivered in the Courts Below

The opinion of the New York Court of Appeals is officially reported in 287 New York 157. It appears in the record at pages 79 to 81.

The opinion of the County Court of the County of Suffolk is officially reported in 175 Miscellaneous Reports 989 and appears in the record at page 69.

B

Statement of Case

1. Statement of facts

The facts are undisputed and undenied.

Petitioners are Jehovah's Witnesses. On June 30, 1940, they entered upon private residential property in the Village of Southampton for the purpose of distributing certain tracts or pamphlets, which were introduced in evidence (R. 49), without first obtaining the consent of the occupant of the premises, thereby violating Ordinance 28 of the Village of Southampton. The ordinance is set forth in the record at pages 17, 69 and 70.

2. Federal questions presented

It is the contention of respondents that the ordinance is constitutional and as enacted constitutes a reasonable, proper and lawful exercise of the police power of the Trustees of the Village of Southampton.

Petitioners argue that the ordinance is unconstitutional and void.

C

Summary of Argument

Ordinance No. 28 as enacted constitutes a reasonable, proper and lawful exercise of the police power delegated to the Village of Southampton and is therefore valid.

1. Authority for enactment.
2. Reasonableness of ordinance.
   (a) Application of ordinance.
3. Discussion of petitioners' argument.

D

Argument

The Boards of Trustees of all villages in the State of New York are authorized by the Village Law to regulate the distribution of handbills, tracts, pamphlets and other matter (Village Law, Section 89, subdivision 48, Appendix) and may prohibit trespass and take such measures as they may deem expedient for good government and the general welfare (Village Law, Section 89, subdivision 58-A, Appendix).

It is immediately apparent that the Southampton Village Trustees have considered their problems, and have undertaken to comply not only with our state laws but also with our United States Constitution in effecting the solution of that problem.

It will be noted that this ordinance is limited strictly in its application to private residential property in the Village of Southampton. It does not interfere with, directly or indirectly, the exercise by any person of any sect, of any of his constitutional privileges or immunities, in any public, semi-public or quasi-public place in the Village of Southampton.

No license or permit for the distribution of tracts, pamphlets or literature of any kind is required, no censoring

is indicated or attempted—all that is required is that any person intending to enter upon private residential property for any of the purposes specified in the ordinance shall respect the occupants' inherent rights of privacy and first obtain his permission to enter—a truly reasonable requirement.

Should it be determined that this ordinance is a reasonable one, enacted pursuant to the police powers for the protection of the health, peace, morals and good order of the community, then the constitutional privileges of the petitioners have not been invaded, their religious freedom and freedom of speech and of the press are not infringed and the ordinance must stand.

The scope and boundaries of the Fourteenth Amendment, upon which petitioner has sought this writ, were clearly set forth in the case of *Barbier* v. *Connolly*, 113 U. S. 27, and in discussing them the court said that "neither the amendment—broad and comprehensive as it is—nor any other amendment, was designed to interfere with the power of the state, sometimes termed its police power, to prescribe regulations to promote the health, peace and morals, education and good order of the people."

Similar ordinances to the Ordinance No. 28 have been held to be valid and a reasonable exercise of the police power.

In *San Francisco Shopping News Co.* v. *City of South San Francisco, et al.*, 69 Federal Reporter, Second Series, petition for writ of certiorari denied 293 U. S. 606, the court in discussing that ordinance said:

> "As a matter of fact, however, the ordinance in question does not prohibit the business of publishing or distributing paper of the class to which the appellant's product belongs. The ordinance merely forbids the distribution of such publication by placing it into automobile, yard, porch, or mail box 'not in possession or under the control of the person so distributing the same.' The ordinance does not forbid the manual de-

> livery of the publication by the carrier to a member of the household; nor, as the appellees point out, are the United States mails closed to 'Shopping News'. The enactment does not prohibit the conduct of the business in question; it merely seeks to regulate the manner in which the product shall be distributed."

And further:

> "Applying, then, both the principles and the phraseology of the many decisions from which we have quoted herein, we cannot say that this 'police regulation has no just relation to the object which it purports to carry out, and no reasonable tendency to preserve the public safety, health and comfort'. That being so, 'the decision of the legislative body is conclusive'.
>
> "Nor can we say that the classification adopted in the ordinance in question is unjust, unfair or unreasonable, for 'the question of classification is primarily one for the legislative power'."

In *Buxbom* v. *City of Riverside, et al.*, 29 Federal Supplement 3, the court, referring to another ordinance similar to that at bar, and specifically to that portion requiring permission to enter before distributing handbills, said:

> "I cannot see how this ordinance, and especially the provision in sections 4, 5 and 6, requiring permission of the owner of property before putting handbills or advertising on it, can be said to violate the right of a free press.
>
> "Freedom of the press is a part of that freedom of expression which includes free speech.
>
> "The right to speak freely does not imply the right to force one's speech on another's private premises.
>
> "As I stated at the trial, no constitutional principle gives one the right to stand on my front lawn and deliver a speech to whomever may listen. Pragmatic American speech disposes of any such claim by the familiar expression 'go and hire a hall'. This is also sound constitutional doctrine.
>
> "In like manner, the right to distribute literature and pamphlets does not imply the right to 'force' acceptance by placing them on another person's premises without his permission.

> "Governmental agencies may protect a property owner in the enjoyment of his property. They may ward off those who would annoy him, by trespassing on it in one way or another. These are verities a la Palisse. See note, Freedom of the Press, 1939, 12 So. Ca. Law Rev. 466."

See also:

People v. *Kuc*, 272 N. Y. 72.

Likewise in *Town of Green River* v. *Fuller Brush Co.*, 65 Federal Reporter, Second Series 112, the court said:

> "It has been uniformly held that while legislative authority may not arbitrarily interfere with the private affairs by imposing unusual and unnecessary restrictions upon a lawful business, yet a considerable latitude of discretion must be accorded to the law making power, and if the regulation operates uniformly upon all persons similarly situated and it is not shown that it is clearly unreasonable and arbitrary, it cannot be judicially declared to be in contravention of constitutional rights."

The local authorities (the Village Board of Southampton) are perhaps the best judges of the necessity for the enactment of such an ordinance and the courts may only interfere with laws or ordinances passed in pursuance of the police power where they are so arbitrary as to be palpably and unmistakably in excess of any reasonable exercise of the authority conferred (*Schmidenger* v. *Chicago*, 226 U. S. 578).

It has been uniformly held that a considerable latitude shall be allowed to the legislative bodies in determining the classification of matters or persons which are the subject of regulation and that the regulatory statute is not arbitrary if founded upon a reasonable distinction (*American Sugar Refining Co.* v. *Louisiana*, 179 U. S. 89; *Brown Foreman Co.* v. *Kentucky*, 217 U. S. 563). Likewise equal protection of the laws does not mean that all occupations that are called by the same name must be treated in the same way (*Dominion Hotel* v. *Arizona*, 249 U. S. 265).

Petitioners have cited many cases decided by this and other courts wherein allegedly similar ordinances have been adjudged null and void. Each of them involves a regulatory ordinance which gives some public officer the power of censoring or licensing or refusing to license the distribution of pamphlets and pamphleteering—quite a different situation from that existing in Southampton, where all that is regulated is the entry upon private residential property, the prerequisite for which is the consent of the occupant thereof.

In Southampton the individual may determine for himself whether or not pamphlets may be distributed or circulated on his premises and whether or not a stranger may enter upon his property to impose his religious beliefs upon the occupant. Our Constitution guarantees to no one the privilege of entering upon private property under any such guise.

To permit petitioners, or others, to invade private residential property at will would be an abuse of constitutional privilege and would take away from the individual the right of privacy which is entitled to all the protection the law can give. Such unrestrained abuse of civil liberties would result in the loss of liberty itself, were it not for the existence of organized society maintaining public order (*Cox* v. *New Hampshire*, 312 U. S. 569).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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Attorney for Respondents.

FRED J. MUNDER,
District Attorney of Suffolk County,

HENRY TASKER,
Assistant District Attorney,

of Counsel.

APPENDIX

SOUTHAMPTON, N. Y., VILLAGE ORDINANCE No. 28

No person shall enter upon any private residential property in the Village of Southampton, Suffolk County, New York, for the purpose of vending, peddling, or soliciting orders for any merchandise, device, book, periodical or printed matter whatsoever; nor for the purpose of soliciting alms, or a subscription or a contribution to any church, charitable or public institution whatsoever; nor for the purpose of distributing any handbill, pamphlet, tract, notice or advertising matter, nor for the purpose of selling or distributing any ticket or chance whatsoever, without the consent of the occupant of said premises previously given.

Nothing herein contained shall be construed to apply to any person who has been a bona fide resident of the Village of Southampton, New York, for a period of at least six (6) consecutive months last past, nor to any person who has maintained a place of business in the Village of Southampton for a period of at least six (6) consecutive months, prior thereto, or his duly authorized representative. Any person violating this ordinance shall be subject to a penalty of not more than One Hundred ($100.00) Dollars for each violation thereof.

Any violation of this ordinance shall constitute disorderly conduct, and the person violating the same shall be a disorderly person.

(REFERRING TO THE POWERS OF THE VILLAGE TRUSTEES)
VILLAGE LAW SECTION 89 SUBDIVISION 48

48. (Hawking and peddling; advertising; poles and wires; banners.) May license, regulate and restrict hawking, vending, peddling, soliciting orders and the crying of goods, wares, merchandise or other commodities in the streets and public places and by going from house to house; may control and restrain the distributing and

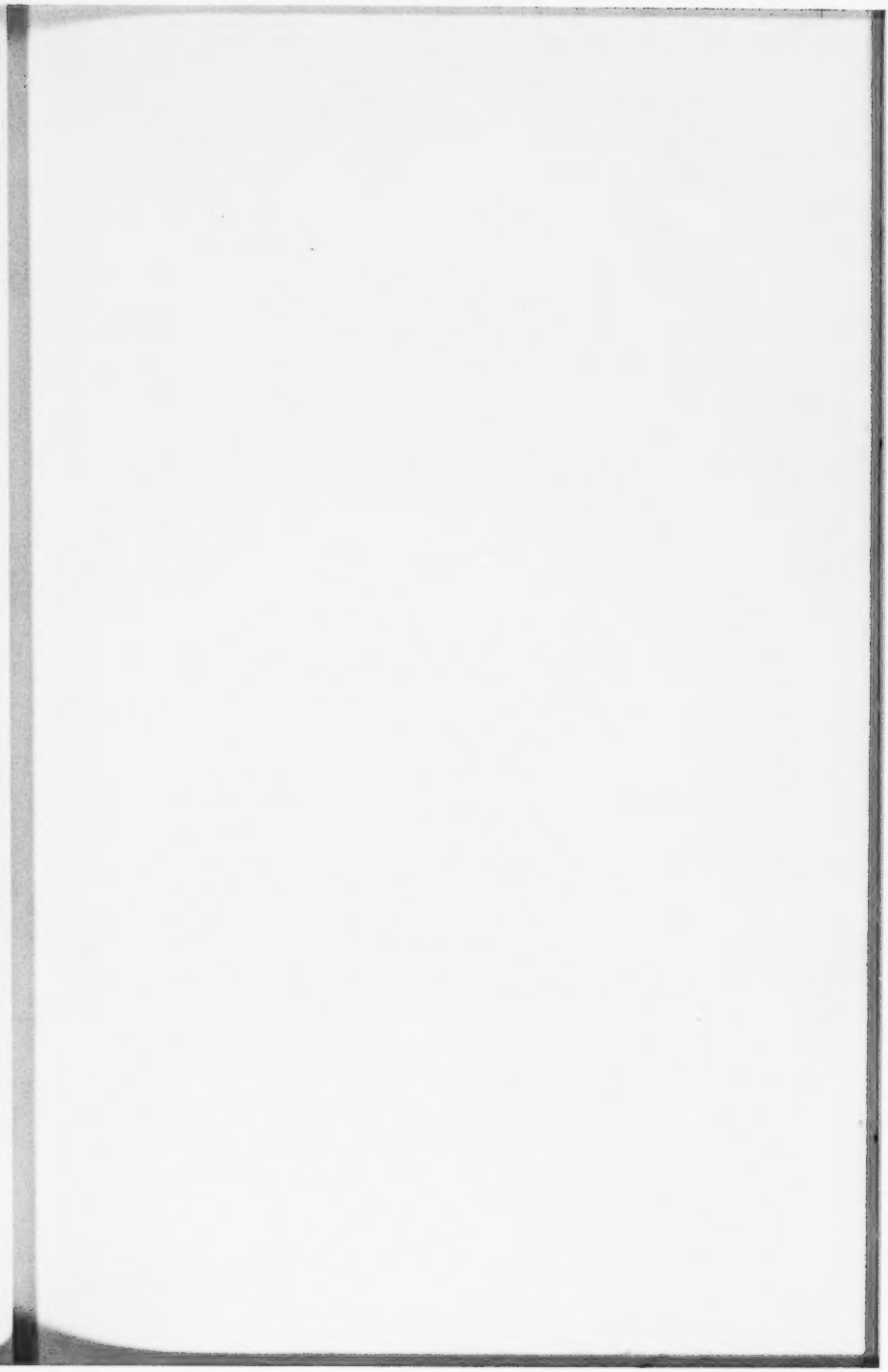
peddling of hand bills, pamphlets, tracts and other like matter in the streets and by going from house to house; may license distributors of bills and other advertising matter; may regulate or prohibit the use of the streets for lights, signs, awnings, horse troughs, posts, poles and wires; may regulate and prohibit the hanging, exhibiting and swinging of banners, placards and flags in, upon and across streets and from one building to another; may regulate and prohibit whistling, ringing of bells and other noise.

VILLAGE LAW SECTION 89 SUBDIVISION 58-A

58-a. (Acts of Trespass.) May prohibit trespass to public and private property, for the purpose of protection and preservation of the property of the village and its inhabitants and of peace and good order.

VILLAGE LAW SECTION 89 SUBDIVISION 59

59. (Promotion of public welfare.) May take all measures, do all acts and enact any ordinances, not inconsistent with existing law which shall be deemed expedient or desirable for the good government of the village, its management and business, the protection of its property, safety and health of its inhabitants, the protection of their property, the preservation of peace and good order, the suppression of vice, the benefit of trade, the preservation and protection of the public streets, the preservation of public health, the prevention and extinguishment of fires and may generally exercise all the powers granted to the village.



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CHARLES ELMORE CROPLEY
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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1941

No. 1005

■

GEORGE BOHNKE and
MRS. HENRY T. (Eloise) BROWN
Petitioners

v.

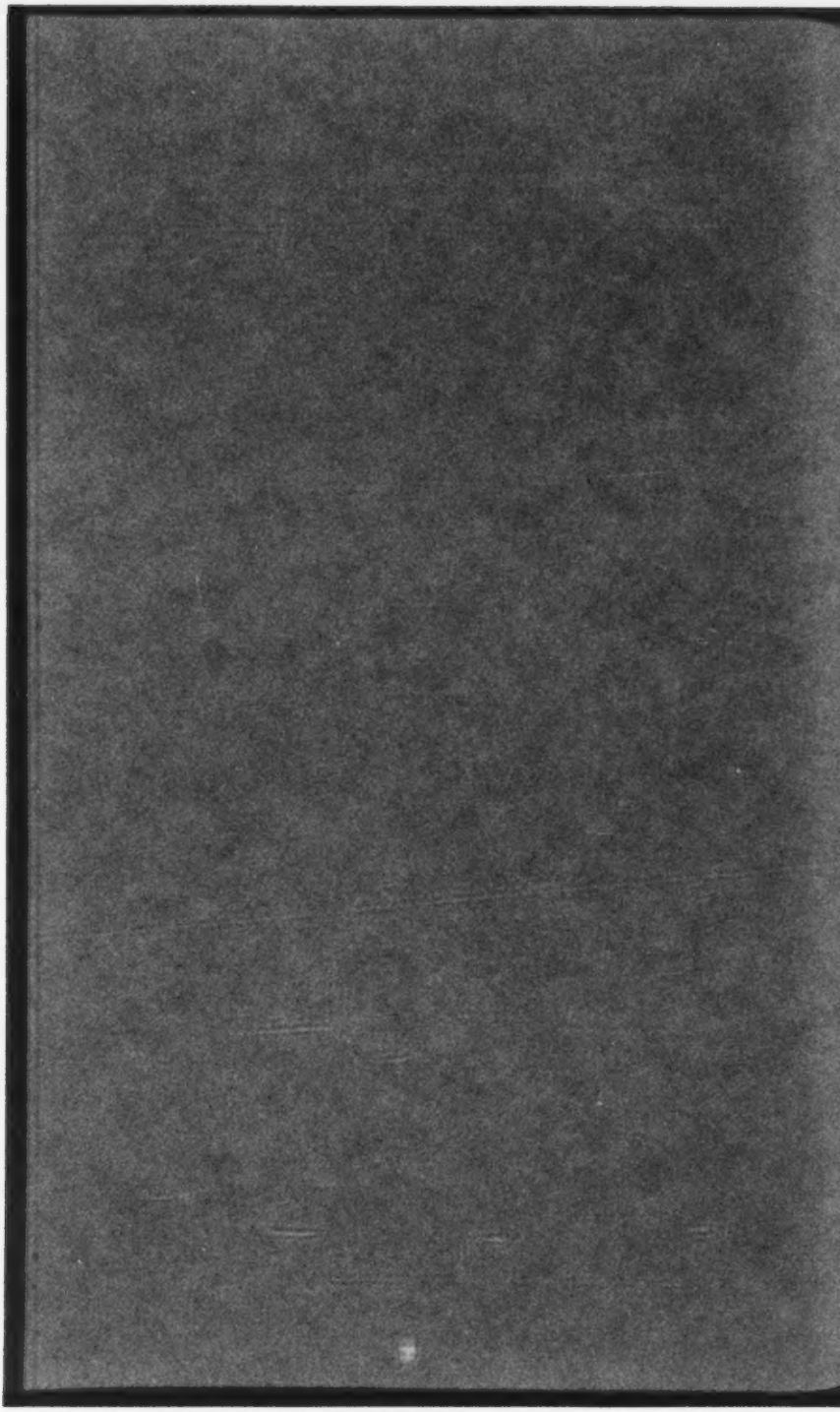
THE PEOPLE OF THE STATE OF NEW YORK
Respondents

■

PETITIONERS' REPLY

to Respondents' Brief in Opposition to Petition for Writ of Certiorari

HAYDEN C. COVINGTON
Attorney for Petitioners



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SUPREME COURT OF THE UNITED STATES

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Respondents

■

PETITIONERS' REPLY

to Respondents' Brief in Opposition to Petition for Writ of Certiorari

Respondents claim authority for the ordinance in question under the statutes of the State of New York duly enacted. We discuss such statutes relied upon by respondents.

Ordinance No. 28 is not authorized by Village Law (S. 89, subd. 58-A) because entering premises of another without prior consent is not trespass. The ordinance does not prohibit trespass but makes it illegal to be a licensee or invitee.

Subdivision 48 (Village Law, S. 89), authorizing regulation and restriction of peddling from house to house, is unconstitutional on its face in so far as it pertains to dissemination of printed matter. The ordinance

does not purport to regulate peddling or distribution of literature in any manner as to time or place; but it is an outright *restriction* and *prohibition* of such rights. That part of above statute about hawking cannot constitutionally apply to preaching the gospel because Jehovah's witnesses are declared by the courts not to be peddlers within the meaning of such laws. *Schneider* v. *State,* 308 U. S. 147; *State* v. *Meredith,* 15 S. E. 2d 678; *Iowa* v. *Mead et al.,* 300 N. W. 523; *Cantwell* v. *Connecticut,* 310 U. S. 296, where this Court unanimously *held* that

> "the statute, *as construed and applied to the appellants,* deprives them of their liberty without due process of law in contravention of the Fourteenth Amendment. The fundamental concept of liberty embodied in that Amendment embraces the liberties guaranteed by the First Amendment. The First Amendment declares that Congress shall make no law respecting an establishment of religion or prohibiting the free exercise thereof. The Fourteenth Amendment *has rendered the legislatures of the states as incompetent as Congress to enact such laws.* . . . Freedom of conscience and freedom to adhere to such . . . form of worship as the individual may choose cannot be restricted by law. . . . In every case the [legislative and police] power to regulate must be so exercised as not, in attaining a permissible end, unduly to infringe the protected freedom." [Italics added]

The village has power to prohibit trespassing, but not the right to revoke a license or an implied invitation as is attempted by this ordinance. No statute authorizes this "Green River" type of ordinance. It exceeds legitimate police power. If there were a statute authorizing it, both would be unconstitutional.

As it would be ordinarily applied, the ordinance reaches only peddlers of *ordinary* articles of merchandise. Under such application it may be considered appropriate police regulation;[1] but see certain cases cited *infra* (pp. 10-11, footnote[8]), where the identical ordinance has been declared invalid as to *commercial* canvassing and peddling. Under circumstances of commercial canvassing it may be doubtfully considered appropriate police regulation.[2]

When applied to preaching of the gospel from house to house and to free-of-charge (i.e., *gift*) distribution of information and opinion in pamphlet or otherwise-recorded form, the ordinance becomes and is unconstitutional, as applied to the facts.[3] The ordinance here questioned, both on its face and by its express terms, invades the right of freedom of the press secured by the Fourteenth Amendment against hostile invasion by the state or a political subdivision thereof. It is immediately apparent that the *village* has not complied with the Federal Constitution in enactment or enforcement of the ordinance in question.

The *police power* mentioned in *Barbier* v. *Connolly*, 113 U. S. 27, has its limitations, recognized by this Court, when the *fundamental personal* rights of freedom of worship and press are concerned. These limitations applicable here are well stated in Freund's work on "The Police Power" (p. 133, s. 143), where it is said:

> "The questions which present themselves in the examination of a safety or health measure are: does a danger exist? is it of sufficient magnitude? does it concern the public? does the proposed meas-

[1] *Town of Green River* v. *Fuller Brush Co.*, 65 F. 2d 112.
[2] *Town of Green River* v. *Fuller Brush Co.*, supra; *Schneider* v. *State*, supra.
[3] *Schneider* v. *State*, supra; *Hannan* v. *Haverhill*, 120 F. 2d 87; *Donley* v. *City of Colorado Springs*, 40 F. Supp. 15; *Zimmermann* v. *London*, 38 F. Supp. 582; *Borchert* v. *City of Ranger* [Tex.], 42 F. Supp. 577.

> ure tend to remove it? is the restraint or requirement in proportion to the danger? is it possible to secure the object sought without impairing essential rights and principles? does the choice of a particular measure show that some other interest than safety or health was the actual motive of legislation?"

There is no rational connection between the unusual and extraordinary method of "control" provided for through this ordinance and the ends claimed to be thereby achieved, viz., prevention of burglary, thievery, etc., from house to house.

The ordinance is not limited to those who enter residential property without prior invitation *for an unlawful purpose.* Were its application so LIMITED it would doubtless be constitutional; but the ordinance *prohibits* such entry *even for lawful and proper purposes.*

Under the ordinance the United States *postman* could be prosecuted. Petitioners went on the premises in the same manner and for the same proper purpose as does the United States postman, to wit, to carry and leave upon the premises for occupants thereof a message from another in which there is a mutuality of interest.

So could the Southampton police arrest and prosecute every Western Union messenger boy who distributes messages at the homes—uninvited, and who (even as the *postman*) often brings to residents unwanted and unpleasant, even annoying, messages.

The ordinance ignores entirely the implied invitation that is extended by each resident or householder to anyone who calls at reasonable times for any and all lawful purposes. Today nearly every owner of residential property demonstrates that such implied invitation exists through his placing at the outer entrance a door-

bell or knocker. In Southampton, unless the occupant has been contacted by letter or telephone for previous consent (thus making greater trouble for the occupant), one entering the premises for any good and lawful purpose could be jailed—he could not determine whether he was welcome or that his entry was consented to until he actually asked the occupant or servant at the door.

The law could not be *equally* applied under all like circumstances, as required by the *Federal* Constitution, because enforcement of the ordinance would depend on whether or not the one contacted or interviewed at the door agreed with, approved or liked the caller or his message delivered or tendered at the door. If it conformed to the philosophy of the occupant, the chances of prosecution would be "nil"; if it did not so conform, the caller could be prosecuted and convicted.

Opinions of neighbors differ, and such differences are not known to the caller until he has opportunity to discuss them with the occupant. The most appropriate place is at the homes of the people. (*Schneider* v. *State,* supra) One distributing circulars on a local political controversy on an issue in which *the village* was divided would run the risk of being convicted for each and every instance where the message delivered was unacceptable to the householder, and for which delivery the caller could be interned[4] *for the duration* of the political campaign, or even longer, depending on the manner and the number of householders reporting his visits to the "gestapo" of the village!

In this relation the ordinance is very like Hitler's Nazi police regulation which requires *every stranger* entering a German town or village to register with the police.[5]

[4] And he would be if the caller's campaign did not have the approval of the "village fathers".

[5] At Southampton similar regulation is *more severe,* for one must submit himself to the local climate for six months before he can 'register' with the police.

If the caller resided in the village for six months, however, he would be *free* to "trespass" and be otherwise thereby licensed to make a nuisance of himself and call from house to house for any unlawful and illegal purpose, i.e., motive. This inequality is patently unconstitutional and void. It is unreasonable. A sneak thief who anchored himself in the village for six months would be free to "invade" the property of all in the village.

The very fact that burglaries and thievery in Southampton continue, as in every other community, and no sneak thief or burglar has been prosecuted under the ordinance in question, is proof conclusive that the claimed aims do not justify the means employed. This is especially true as to application of the ordinance to the facts in this case where it is admitted that Jehovah's witnesses are not of the class specifically aimed at by the ordinance (i.e., upper-story craftsmen and sneak thieves). See Opinion, Judge of County Court, R. p. 73, fols. 218, 219.

The cases of *San Francisco Shopping News Co.* v. *City of South San Francisco,* 69 F. 2d 879, and *Buxbom* v. *City of Riverside,* 29 F. Supp. 3, relied upon by respondents, are not in point. There the ordinances did not prohibit entry upon the property. The literature involved *commercial solicitation for sale of ordinary articles of merchandise* or printed *commercial advertising* and NOT 'printed public opinion, information, etc.' In *Schneider* v. *State,* supra, by dictum it was held that commercial soliciting and canvassing—involved in the *Shopping News* and *Buxbom* cases, supra—could be regulated and restricted; but held that when such laws are applied to press activity of Jehovah's witnesses same are unconstitutional. Mr. Justice Roberts said:

> " . . . Mere legislative preferences or beliefs respecting matters of public convenience may well

support regulation directed at *other personal activities,* but be insufficient to justify such as diminishes the exercise of rights so vital to the maintenance of democratic institutions. . . .

"*Frauds* may be denounced as offenses and punished by law. *Trespasses* may similarly be forbidden. If it is said that these means are less efficient and convenient than bestowal of power on police authorities to decide what information may be disseminated from house to house, and who may impart the information, the answer is that *considerations of this sort do not empower a municipality to abridge freedom of speech and press.*" [Italics added]

The municipality cannot restrict or prohibit press activity from house to house as it also cannot restrict such activity on the streets. Mr. Justice Roberts said:

"And perhaps the most effective way of bringing them [pamphlets] to the notice of individuals is their distribution *at the homes of the people.*" [Italics added]

By denial of certiorari in the *Shopping News* case, supra, this Court did not approve the strange analogy and sophistry advanced by respondents here. (Cf. *Bowden et al.* v. *City of Fort Smith, Ark.,* No. 314 October Term 1941, certiorari *denied* Oct. 13, 1941, 62 S. Ct. 99, AND THEREAFTER on March 16, 1942, certiorari *granted;* see, also, *United States* v. *Carver,* 260 U. S. 482, 490.) Furthermore, that *Shopping News* case and the *Buxbom* case, supra, have been expressly overruled by *Hague* v. *C. I. O. et al.,* 307 U. S. 496, affirming 101 F. 2d 774. In the *Hague* case the Circuit Court of Appeals concerning an ordinance identical in terms with the ordinances in *Shopping News* and *Buxbom* cases, supra, said:

> "Such an ordinance is *invalid upon its face* in that it violates freedom of speech and of the press, fundamental civil rights protected by the Fourteenth Amendment from any abridgment by State action. *It is squarely within the decision of the Supreme Court of the United States* in Lovell v. City of Griffin, 303 U. S. 444." [Italics added]

The ordinance here is not similar to the one involved in *San Francisco Shopping News Co.* v. *City of South San Francisco,* supra. The Southampton ordinance actually does *forbid manual delivery* of publications by carrier to a member of the household. Therefore the basis for holding the South San Francisco ordinance valid does not apply here. Such is not in point. There the Circuit Court of Appeals said:

> " . . . The ordinance does not forbid the manual delivery of the publication by the carrier to a member of the household; . . . "

Here no claim or intimation is made that petitioners *forced* their message on anyone. If it can be considered as "forcing", then every United States postman in the country is guilty of 'forcing himself upon others' in their homes and 'invading their privacy'; and such is equally true of every Western Union messenger in the country.

The fact that the message delivered and left by petitioners was for the benefit of the householder clearly implies that no one could properly object. There is no evidence that petitioners *actually trespassed* or refused to leave when ordered to do so. There is no claim that any householder objected to the contents of the literature or the method of distribution. There is no evidence or finding supporting the claim by respondents that petitioners "forced" or imposed their beliefs upon the

"religious beliefs" of any resident in the fair and lovely village of Southampton.

The ordinance does not secure to the residents their "privacy" as contended. The law, on the contrary, *unlawfully* (i.e., unconstitutionally) "imprisons" inhabitants of the unique village, by keeping away from said inhabitants all persons who would bring to them a message of benefit and mutual interest. Even the postman is not excepted from the terms of this vicious, un-American ordinance.

The New York trespass statutes are sufficient to protect the householder in event the caller enters after notice not to do so, or refuses to leave after being requested to do so. There is no rational need for the unreasonable invasion here by the "village fathers" of the right of the householder or resident to determine for himself, in every case as it arises, whether the particular visitor or his message is or is not desired after the resident has had opportunity to consider and decide. It is time enough for the village trustees, who, respondents say, are the sole custodians of the Federal Constitution, to intervene when an actual trespass is discerned, and not before.

The subtle argument made by respondents under the guise of protecting "privacy"[6] should be rejected. We do not believe that this Court will hold that the "trustees" of the village can by legislative fiat 'push the head of every resident under the sand' (as the proverbial ostrich voluntarily "beheads" itself when danger approaches), thus to blind the residents to the real danger that threatens them and all other Americans as warned by petitioners in the leaflets distributed "without price" *in the public interest.*

This Court has the power to reject—without oral argument, discussion or expression of opinion—the

[6] *Privacy* is "swung", i.e., strained, stretched and distorted, by respondents so as to prevent an approach *for any purpose* toward the home of another.

argument or reasons advanced by Jehovah's witnesses[7] as to why this Court ought to grant certiorari and hear this case. Surely this Court will not (by any *in pectore* decision, withholding expression in writing of its reasons, for the benefit of *all*) overrule the discreet judgment, logical discussion and just conclusion reached by fourteen other courts, State and Federal, holding such "Green River" type of ordinance as is here involved unconstitutional both on its face and as construed and applied.

Here let members of the Court read the cases referred to.[8]

[7] *Leoles* v. *Landers*, 302 U. S. 242.
Coleman v. *City of Griffin*, 302 U. S. 636.
Hering v. *St. Bd. of Educ.*, 303 U. S. 624.
Watch Tower v. *Bristol*, 305 U. S. 572.
Gabrielli v. *Knickerbocker*, 306 U. S. 621.
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[8] *Borchert* v. *City of Ranger* (Tex.) *et al.*, 42 F. Supp. 577 (ordinance of City of Ranger); R. pp. 85-89, containing unreported decree, findings of fact and conclusions of law of United States Dist. Ct., West. Dist. of Ark., involving Harrison (Ark.) ordinance in *Widle* v. *Harrison et al.; Donley* v. *City of Colorado Springs*, 40 F. Supp. 15; *Zimmermann* v. *London*, 38 F. Supp. 582; *City of Columbia* (S. C.) v. *Alexander*, 119 S. E. 241;

It appears that the profound and learned explication those other courts have given the instant question (contrary to the reasoning and conclusions of the New York Court of Appeals and the Suffolk County Court) deserves and justifies a thorough analysis, discussion and consideration and determination of the issue with and by this Court. Such can ensue only upon the granting of certiorari as prayed for in the petition herein and setting of the case for oral argument.

Conclusion

The writ of certiorari should be granted.

HAYDEN C. COVINGTON
Attorney for Petitioners

[Footnote *continued* from preceding page]

Real Silk Hosiery Mills v. *City of Richmond, Calif.*, 298 F. 126; *Ex parte Maynard*, 275 S. W. 1071; *City of Orangeburg* v. *Farmer*, 181 S. C. 143; 186 S. E. 783; *Jewel Tea Co.* v. *Town of Bel Air*, 172 Md. 536; 192 A. 417; *Prior* v. *White*, 180 So. 347; 116 A. L. R. 1176; *White* v. *Town of Culpeper*, 172 Va. 630; 1 S. E. 2d 269; *N. J. Good Humor, Inc.* v. *Bd. of Comm.*, 11 A. 2d 113, 114; *City of McAlester* (Okla.) v. *Grand Union Tea Co.*, 98 P. 2d 924; *De Berry* v. *City of La Grange, Ga.*, 8 S. E. 2d 147; *Jewel Tea Co.* v. *City of Geneva, Nebr.*, 291 N. W. 664; *Hague* v. *C. I. O. et al.*, 101 F. 2d 774; 307 U. S. 496.

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OCTOBER TERM 1941

No. 1005

GEORGE BOHNKE and MRS. HENRY T. (ELOISE) BROWN,
Petitioners,

against

THE PEOPLE OF THE STATE OF NEW YORK,
Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE COUNTY COURT OF SUFFOLK COUNTY, STATE OF NEW YORK

BRIEF ON BEHALF OF AMERICAN CIVIL LIBERTIES UNION, *AMICUS CURIAE,* IN REPLY TO RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR CERTIORARI

DOROTHY KENYON
On behalf of
AMERICAN CIVIL LIBERTIES UNION
Amicus Curiae.

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(1) This type of ordinance, which is known as the "Green River type", is a criminal ordinance pure and simple as distinguished from the more common licensing type of ordinance which has been held unconstitutional when applied to non-commercial pamphlet distribution 4

(2) The Green River type of ordinance has been almost uniformly held unconstitutional, whether applied to door to door vendors of merchandise or to pamphleteers 5

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(3) While these ordinances relate only to merchandise vendors and the Southampton ordinance covers non-commercial pamphlet distributors as well, it is submitted that this is a distinction without a difference and that, if the flat prohibition of commercial vending is unconstitutional, a fortiori the prohibition of non-commercial pamphleteering is unconstitutional as well 7

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(4) The ordinance cannot be saved by asserting, as did the New York Court of Appeals, that it is not prohibitory in nature, but is merely regulatory of the subject matter and that the regulations are reasonable. It is respectfully submitted that it is prohibitory and that the exceptions granted are arbitrary and unreasonable 7

(5) The ordinance is an unwarranted and unreasonable exercise of the police power, not justified by any existing danger or emergency, and therefore in its application to pamphlet distributors unconstitutional and void 8

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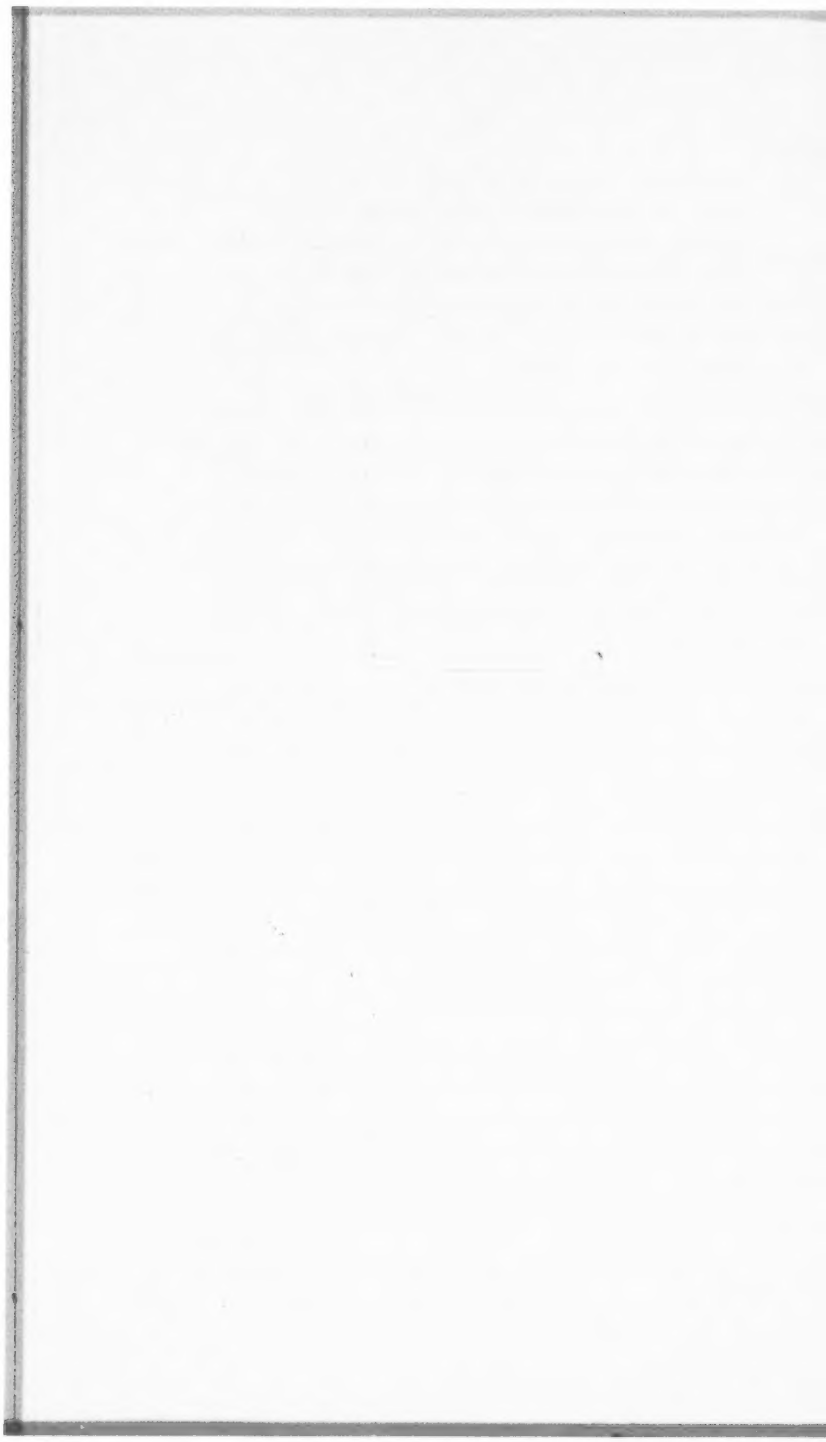

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Preliminary Statement

The American Civil Liberties Union, a non-partisan, non-sectarian organization, with a membership of thousands of persons in all the states of the Union, including New York State, has for the last twenty years or more endeavored to carry out its objects as stated in its charter, namely "to maintain throughout the United States and its possessions the rights of free speech, free press, free assemblage and other civil rights and to take all legitimate action in furtherance of such purposes." In pursuance of these objects it

has fought invasions of civil liberties wherever it has found them, has defended in the courts those whose civil rights it believed to be invaded and has appeared as amicus curiae in hundreds of cases involving issues of civil liberties.

In the opinion of the American Civil Liberties Union the preservation of the rights of free speech and free press requires that there should be no prohibition or limitation prohibitive in effect upon the distribution of ideas, whether by sales or by free distribution of printed matter and whether in public places or from house to house. Personal house-to-house distribution of tracts, pamphlets and other papers is as essentially an exercise of the right of freedom of the press and of expression generally as is the publication and distribution of newspapers and periodicals, whether through the mails or over the newsstands, and as is the dissemination of ideas by word of mouth, by personal conversations, at meetings or over the radio. Unrestricted personal distribution of this nature serves a vital democratic need. Not all of us who have thoughts and ideas which we desire to express to others, whether to a large or small audience, can broadcast them over the radio or on the pages of the great dailies. What is available to most of us is personal contact with our neighbors and fellows.

Pamphlets have played a glorious role in the history of the development of ideas. The composition of ideas in the market-place is seen at its best in pamphleteering. One of the greatest roles in the early struggles of this country against despotism, in the establishment of this nation and in the formation of our democratic form of government, was played by persons now known as the "Pamphleteers". Tom Paine, Thomas Jefferson, Samuel Adams, Alexander Hamilton, James Madison, John Jay, and others whose name is legion, wrote the philosophy and provided the ideology underlying the Declaration of Independence, our war for freedom, the Constitution of the United States and the Bill of Rights itself. Pamphlets, leaflets, tracts—without these

it is hard to visualize how we could ever have attained that unity in freedom which we all prize and love so well.

As was said in *Schneider* v. *Irvington,* 308 U. S. 147, "Pamphlets have proved most effective instruments in dissemination of opinion. And perhaps the most effective way of bringing them to the notice of individuals is their distribution at the homes of the people".

This precious right, the right to pamphleteer, must never be destroyed.

It is because of our devotion to this principle of freedom that we file this brief today. None of the governing body of the Union are members of Jehovah's Witnesses nor do they share the religious convictions of that group.

This brief is directed solely to the constitutional issues involved, more particularly as challenged in respondent's brief in opposition to the petition.

Statement of Facts

The facts themselves are simple and undisputed. Members of a religious group known as Jehovah's Witnesses went from door to door in the Village of Southampton in the early morning hours distributing leaflets in accordance with their prescribed religious practices. They went silently and neither knocked on doors nor rang doorbells, their sole purpose being distribution of the tracts. Neither of them had previously secured the consent of the occupants of the premises; neither of them had resided or maintained a place of business in the Village for six months, the two alternative requirements under the Village ordinance whose constitutionality we challenge.

I

The village ordinance in question is repugnant to the Fourteenth Amendment to the Constitution of the United States.

(1)

This type of ordinance, which is known as the "Green River type", is a criminal ordinance pure and simple as distinguished from the more common licensing type of ordinance which has been held unconstitutional when applied to non-commercial pamphlet distribution.

The Green River type of ordinance makes it criminal, with certain exceptions, to vend or distribute material from door to door. It is to be sharply differentiated from the licensing type of ordinance in the same field. The licensing (i. e. prior restraint) type has been upheld insofar as it is limited in its application to vendors of merchandise and solicitors commercial in character. The licensing type has however been held unconstitutional as in violation of freedom of speech and press insofar as it has gone beyond the commercial field and into the field of pamphlet distribution generally (see *Schneider* v. *Irvington, supra; Cantwell* v. *Connecticut*, 310 U. S. 296) although the courts have indicated that reasonable regulations might perhaps be worked out in the latter case. In *Schneider* v. *Irvington, supra*, for instance, the court says that it does not hold "that the town may not fix reasonable hours when canvassing may be done by persons having such objects as the petitioner" (i. e. Jehovah's Witness). But the general rule of law in respect to licensing ordinances is clear "To require a censorship through license which makes impossible the free and unhampered distribution of pamphlets strikes at the very heart of the constitutional guarantee".

The licensing type of ordinance having been held inapplicable to cases of door to door distribution of pamphlets, the Green River type of ordinance has been resorted to instead but so far without much success.

(2)

The Green River type of ordinance has been almost uniformly held unconstitutional, whether applied to door to door vendors of merchandise or to pamphleteers.

The first case in this field (*Town of Green River (Wyoming)* v. *Fuller Brush Co.*, 65 Fed. (2) 112, 1933, quoted at length in respondent's brief) has lent its name but not its logic to a long line of subsequent cases dealing with vendors of merchandise (as in the Green River case itself) and also with pamphlet distributors, of both the advertising and the non-commercial variety.

A

The merchandise vendor type of case.

In the line of cases dealing with vendors of merchandise the courts have almost uniformly refused to accept the reasoning of the original Green River case and have held such ordinances unconstitutional.

See

City of Orangeburg v. *Farmer* (181 S. C. 143; 1936);

Jewel Tea Company v. *Bel Air*, 172 Maryland 536; 1937 (Green River type of criminal ordinance coupled with exemptions granted to local merchants or farmers or "any one duly licensed");

Prior v. *White (Florida)* 180 So. 347, 1939;

White v. *Town of Culpeper*, 172 Virginia 630; 1939 (a combination of the Green River type of criminal ordinance, directed against solicitation, and the licensing of peddlers);

City of McAlester v. *Grand Union Tea Company*, 98 Pac. Rep. (2) 924, 1940;

DeBerry v. *City of LaGrange*, 8 S. E. (2nd) 146, 1940;

Jewel Tea Company v. *City of Geneva*, 291 N. W. 664, 1940;

N. J. Good Humor Inc. v. *Board of Commissioners*, 124 N. J. L. 162, 1940.

B

The pamphlet distribution type of case.
Advertising Pamphlets

In the line of cases dealing with pamphlet distribution a few early California cases (among them *San Francisco Shopping News* v. *City of South San Francisco,* 69 Fed. (2) 879, 1934; and *Buxbom* v. *City of Riverside,* 29 Fed. Sup. 3, both quoted at length in respondent's brief) follow the reasoning of the Green River case. But since, like the original Green River case itself, they deal entirely with commercial distribution they are no precedent for the situation in the case at bar.

Non-Commercial Pamphlets

When we come to the field of non-commercial pamphlet distribution, however, i. e. the field of the true dissemination of ideas, we find the reasoning of the original Green River case squarely repudiated. A recent line of cases in this field is closely analogous to the case at bar. Although the ordinance in question in each instance related only to the vending of merchandise the cases themselves had to do solely with with the distribution of non-commercial pamphlets—in every instance by Jehovah's Witnesses. And in each instance the courts held that the ordinance was void as violative of the Constitutional guarantees of free speech and press.

See

Zimmerman v. *Village of London, Ohio* (U. S. District Court, Southern District of Ohio, decided April 25, 1941)

Donley and Jackson v. *City of Colorado Springs* (U. S. District Court, District of Colorado, decided August 6, 1941)

E. C. Widle v. *City of Harrison, Arkansas* (U. S. District Court, Western District of Arkansas, decided Jan. 9, 1941).

(3)

While these ordinances relate only to merchandise vendors and the Southampton ordinance covers non-commercial pamphlet distributors as well, it is submitted that this is a distinction without a difference and that, if the flat prohibition of commercial vending is unconstitutonal, a fortiori the prohibition of non-commercial pamphleteering is unconstitutional as well.

(4)

The ordinance cannot be saved by asserting, as did the New York Court of Appeals, that it is not prohibitory in nature, but is merely regulatory of the subject matter and that the regulations are reasonable. It is respectfully submitted that it is prohibitory and that the exceptions granted are arbitrary and unreasonable.

As was said in *Zimmerman* v. *Village of London Ohio, supra.*

> "The arrests were made for distributing printed material upon private property without invitation of the owner or occupant. * * *
>
> "In the case now before this court, the ordinance imposes no censorship upon the 'free and unhampered distribution of pamphlets'; (quoting from *Lovell* v. *Griffin, 303 U. S. 444); it imposes what amounts to a virtual prohibition upon such distribution* * * *" (italics ours).

With all due deference to the New York Court of Appeals, it is submitted that that is precisely the situation here. The exceptions granted by this ordinance, i. e. prior consent or six months' residence in the Village, appear to us to be neither reasonable nor practicable. The Court itself admits that it is only the small size of the Village in question which gives validity to the residence requirement. It makes no attempt to justify the prior consent requirement. We question whether even in a Village of this size the inhabitants can possibly know or identify one another. The ordinance therefore in effect amounts to an absolute prohibition upon distribution.

(5)

The ordinance is an unwarranted and unreasonable exercise of the police power, not justified by any existing danger or emergency, and therefore in its application to pamphlet distributors unconstitutional and void.

As Justice Brandeis has said *(Whitney* v. *California,* 274 U. S. 357; 47 Sup. Ct. 641—1927): "Only an emergency can justify repression. Such must be the rule if authority is to be reconciled with freedom".

The opinion of the court below and the argument of the respondents herein rest exclusively on the proposition that the ordinance constitutes a valid exercise of the police power. They point to the danger from jewel thieves and say that the remedy is reasonably related to the end sought.

Granting the advantages to a community of a sense of peace and security, will anyone nevertheless contend that the danger from jewel thieves is great enough, the gains from their eradication (if such indeed be the result) sufficiently important to the community as a whole to justify the total prohibition of this important branch of free speech and press—namely, door to door pamphlet distribution? Are we in other words to give up free speech and press in favor of jewels—for those who have them?

If the emergency is really as great as claimed it is submitted that it is somewhat surprising that the bulk of the people of Southampton, by continuing to give implied consent to uninvited visits, appear so singularly unaware of their great peril. Were the danger as great as claimed the villagers could do a few simple and obvious things; they could put up high fences and locked gates, they could even hang out "No trespassing" signs. Were they to do so there would be no need for the Ordinance in question.

Summary

The ordinance therefore insofar as it be deemed applicable to door to door distribution of non-commercial pamphlets is clearly an unlawful invasion of the rights of free speech and free press. Insofar as these are religious pamphlets it invades the right of religious freedom as well. Insofar as it unfairly discriminates between residents and non-residents it violates the constitutional guarantee of the equal protection of the laws. And, insofar as it transcends the powers conferred upon the village by the Village Law and the police power generally, it violates due process and is ultra vires and void.

Conclusion

For the reasons above stated, it is respectfully submitted that the New York Court of Appeals erred in affirming the judgments of conviction of the petitioners herein; and, in view of the apparent variance between the Court's decision and earlier decisions of the Supreme Court in analogous cases, and also in view of the public importance of the issues involved, particularly in these days when we are all of us engaged in a worldwide struggle for our ancient freedoms, it is respectfully urged that the court grant the writ sought.

Respectfully submitted,

DOROTHY KENYON
On behalf of
AMERICAN CIVIL LIBERTIES UNION
Amicus Curiae